Re Ice-Mack Pte Ltd; AA Valibhoy & Sons (1907) Pte Ltd v Official Receiver

HIGH COURT (SINGAPORE) — COMPANIES WINDING UP NO 11 OF 1983
YONG PUNG HOW J
15 SEPTEMBER 1989

Companies and Corporations — Winding up — Proof of debt — Debt owed by 'associated' company — Debt purportedly paid by director — Evidence of debt — Companies Act (Cap 50, 1988 Ed), s 327 — Companies (Winding-Up) Rules 1969, rr 78 & 81

Evidence — Proof of debt — Debt owed by 'associated' company — Companies controlled by same person — Debt purportedly paid by director — Burden to prove debt — Evidence required for proof of debt

Contract — Quasi-contract — Restitution — Accord and satisfaction — Debt paid by director on behalf of company — Claim for repayment — Proof of debt in winding up

The applicant had filed a proof of debt against the company that had been wound up. The applicant and the company were 'associated' in that one person was the controller of both. The official receiver rejected the proof since it was not supported by any documentary evidence except some pages from the applicant's own ledger books. The applicant appealed to the High Court for the official receiver's decision to be varied or reversed and for the claim to be admitted in full.

Held, dismissing the application:

(1) Given the close relationship between the two associate companies, the dominant position in them of Y and his family, the fact that Y who was filing the affidavits on V's behalf was also the person who controlled and managed the company before it was wound up, and the great ease with which inter-company transactions between the two companies were devised and implemented, it was necessary to put V to strict proof of all its assertions.

(2) The evidence of the debt put forward by V was a miscellany of pages extracted from its own ledgers, its own audited accounts, an isolated certificate from its own accountants and an audit confirmation signed for the company by Y just before the company was wound up. The relationship between the companies and the manner in which the persons who had exercised control over them presented their claim depreciated the value which would normally be given to audited accounts.

(3) It may well be that in a straightforward case, documents such as those produced by V might be accepted as sufficient evidence to prove a debt obligation. But in the present case once the validity of the claim was challenged, V had to produce proper evidence of the debt, eg by producing credit and debit notes, the vouchers and receipts and other documentary evidence. This evidence had been asked for repeatedly by the liquidator but was not forthcoming.

(4) The court, therefore, concluded that V had failed to prove that there had been a debt owed by the company to them as at the date of the winding-up order.

(5) However, on the assumption that the debt did exist, the purported transfer of the obligation to Y was effective. Y had purportedly settled the company's debt and therefore, that debt would have been extinguished.

Cases referred to

1 *Hirachand Punamchand & Ors* v *Temple* [1911] 2 KB 330 (folld)
2 *Beswick* v *Beswick* [1968] AC 58 (refd)

Legislation referred to

Companies Act (Cap 50, 1988 Ed) s 327
Companies (Winding-Up) Rules 1969 rr 78, 81.

Andrew Chia for the applicant.
Emily Wilfred and *Wong Sheng Kuai* for the respondent.

Cur Adv Vult

Yong Pung How J: In this matter, Ice-Mack Pte Ltd (the 'company') was wound up by the High Court on 11 March 1983 and the official receiver was appointed liquidator. AA Valibhoy & Sons (1907) Pte Ltd ('the applicant'), which was an associate company, filed a proof of debt on 2 September 1985 for $2,428,418.49. Apart from some pages from the applicant's own ledger books, there were no other documents to support the applicant's claim. After several reminders to the applicant to provide proof of debt, the official receiver, as liquidator, rejected the claim on the ground that it was not supported by documentary evidence. On 2 August 1988, the applicant appealed to the High Court for the official receiver's decision to be reversed or varied and for the claim to be admitted in full.

In the winding up of a company, s 327 of the Companies Act (Cap 50, 1988 Ed) provides that all claims against the company are admissible to proof against the company. The procedure for proof is set out in the Companies (Winding-Up) Rules 1969, under which the burden of proof is cast on the claimant. Rules 78 and 81 provide as follows:

> 78 In a winding up by the court every creditor shall prove his debt, unless the judge in any particular winding up shall give directions that any creditors or class of creditors shall be admitted without proof.
>
> 81(1) A statutory declaration proving a debt shall be in the Form 77 set out in the Second Schedule to the Regulations and shall contain a statement of account showing the proofs of debt and shall specify the vouchers, if any, by which the same can be substantiated.
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> (2) The liquidator to whom the proof is sent may at any time call for the production of the vouchers.

In considering the appeal, the High Court had before it four affidavits on behalf of the applicant by Mr Mohd Yunus Valibhoy, described in the affidavits as the former manager and director and in a board minutes of the applicant as the former chairman and managing director of the applicant, filed on 27 January 1989, 25 February 1989, 3 March 1989 and 9 March 1989; and three affidavits by or on behalf of the official receiver filed on 9 February 1989, 2 March 1989 and 8 March 1989. It is instructive to follow the sequence of these affidavits.

In his first affidavit on behalf of the applicant filed on 27 January 1989, Mr Valibhoy averred that during the period from 1979 to 1982 the applicant made various 'loans and payments for and on behalf of the company amounting to $2,428,419.49 to enable the company to continue in business. At the material time, he was not only either the manager and director or the chairman and managing director of the applicant, but he was also a director of the company. As evidence of the debt, Mr Valibhoy annexed to his affidavit photocopies of the relevant pages of the applicant's ledger for the period from 1979 to 1982. On 9 February 1989, the official receiver filed an affidavit in reply. In noting that the claim was said to have arisen from loans and payments for and on behalf of the company, the official receiver pointed out that these were the same ledger pages which had been submitted earlier in proof of debt, and had been rejected. The ledgers were merely the applicant's own internal records of accounts, and parts of a double entry system. The primary documents to substantiate a claim would be credit and debit notes, vouchers and receipts. These documents had been asked for by the official receiver on several occasions to substantiate the applicant's claim, but had never been produced.

On 25 February 1989, Mr Valibhoy filed a second affidavit exhibiting to it copies of the applicant's audited accounts for the years ended 31 December 1979, 1980, 1981 and 1982. Of these, the audited accounts for 1982 were said to show a sum of $2,428,418.49 due and owing by the company to the applicant. On 2 March 1989, the official receiver's accountant filed an affidavit in reply. This pointed out that these audited accounts exhibited for the four years did not show any such debt. For the years 1979, 1980 and 1981 the lists of associate concerns owing money to the applicant showed that the amounts due from the company to the applicant were only $7,250.65, $32,343.56 and $486,170.40 respectively; and for the year 1982 the total amount due from associate concerns (which, unlike earlier years, was not broken down to show the amount due from each individual concern) was only $79,592.16.

On 3 March 1989, Mr Valibhoy filed his third affidavit which exhibited a breakdown of the total amount of $79,592.16 owed by associate companies to the applicant as at 31 December 1982. The list of debtors set out in this breakdown did not include the company. Mr Valibhoy admitted that the breakdown did not disclose any debt owed by the company to the applicant at that date; but he explained that this was only because at that time the company had been wound up, and he had agreed to bear the debt personally so that the applicant would not be put to loss. Accordingly, the breakdown also set out a separate list of the directors who had debts to the applicant as at 31 December 1982 and this showed a debt of $2,538,190.19 owed by Mr Valibhoy to the applicant. Whatever his reasons were for agreeing to bear any debt personally, the reason given for doing so could not be correct, in this case, since the company was only wound up on 11 March 1983. As evidence of this, however, his affidavit exhibited a copy of the minutes of a board meeting of the applicant which was specifically called for the purpose on 2 April 1984, which was attended by his wife Mrs Mehroon Neesha Valibhoy, and another director Mr Mohd Yunus A Gani, and was chaired by him, at which:

> It was resolved that all the amount paid to M/s Ice-Mack Pte Ltd up to 31 December 1982 and due from them, be transferred to the account of Mr Mohd Yunus Valibhoy, the chairman and managing director of this company (AA Valibhoy & Sons (1907) Pte Ltd) and he has agreed to fully reimburse the company of the amounts.

His third affidavit also exhibited a statement by the applicant's accountants dated 2 March 1985 as follows:

> To whom it may concern
>
> We hereby confirm that the amount of $2,428,418.49 due from Ice-Mack Pte Ltd, Singapore as at 31 December 1982, was transferred to the account of Mr Mohamed Yunus Valibhoy, the managing director, in the book of AA Valibhoy & Sons (1907) Pte Ltd, since he agreed to accept the debit.
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> Singapore — Natarajan & Swaminathan
> Dated 2 March 1985 — Chartered Accountant
> Public Accountants, Singapore

The picture presented then by the applicant's audited accounts for 1982 was that as at 31 December 1982, Mr Valibhoy himself owed the applicant $2,538,190.19 while the company no longer appeared in the list of associate concerns which owed money to the applicant. Instead therefore of proving that the company owed money to the applicant, the effect of the new disclosures in Mr Valibhoy's second and third affidavits was to prove prima facie that as at 31 December 1982, just before it was wound up on 11 March 1983, the company did not owe any money to the applicant at all. It would appear that, the use of the audited accounts having got it into an unenviable position, it became necessary for the applicant to reconstruct its claim against the company. For this purpose, Valibhoy went on to explain in the third affidavit that:

> Notwithstanding the fact that the debt of $2,428,419.49 due from Ice-Mack Pte Ltd was transferred over to me, the applicant had agreed with me then to claim from the official receiver the sum of $2,428,418.49 from Ice-Mack Pte Ltd and to account to me for the same.

However, no evidence at all was produced to substantiate this averment of an important agreement, although one would have expected it to have been covered as well in the minutes of the applicant's board meeting of 2 April 1984.

As further support, the third affidavit also exhibited an audit confirmation from the company purporting to confirm that there was a balance of $2,428,419.49 which was due by the company to the applicant as at 31 December 1982. In anything resembling an arms-length situation, an audit confirmation would of course be strong

evidence against a party of the correctness of the credit or debit balance which it has confirmed. This particular confirmation was signed on behalf of the company, however, by Mr Valibhoy and, in all the circumstances, unless it was corroborated by other more independent evidence, could not be accepted as evidence of the debt which it purported to confirm.

On 8 March 1989, the official receiver filed an affidavit in reply to Mr Valibhoy's third affidavit. The official receiver pointed out that, if there had been a debt owed by the company as alleged, then in view of the disclosures in Mr Valibhoy's third affidavit the debt was no longer owing by the company after 2 April 1984 as Mr Valibhoy had agreed to assume full liability for the debt. The official receiver then went further and referred to certain paragraphs in two affidavits both filed on 6 March 1985 in another related Companies Winding-up No 434 which showed that the debt, said to have been owed by the company to the applicant and to have been transferred to Mr Valibhoy, had been reimbursed subsequently in some way or other by him to the applicant. One of the two affidavits was by Mrs Hehroon Neesha Valibhoy, the wife of Mr Valibhoy and a director of the applicant, and the averments in the relevant paragraphs were as follows:

> 16 There is now produced and shown to me and attached herewith and marked 'MNV-2' photocopies of entries in the books regarding Ice-Mack Pte Ltd and photocopy of the certificate from the accountants marked 'MNV-3'.
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> 17 The information deposed to herein in relation to the facts of the loan utilized by Ice-Mack Pte Ltd on the directions of the directors of the company is now obtained by me from the accounts of the company and the auditors certificate.
>
> 18 In my submission the fact that one of the directors Mohamed Yunus Valiboy has reimbursed the company of the actual sums of money taken by Ice-Mack Pte Ltd will not in my submission in any way effect the position of the petitioners herein who by their acts were not entitled to present a petition to wind up the company.

The other of the two affidavits was by Mr Mohamed Yunus Gani, the other co-director of Mr Valibhoy on the board of the applicant, and the averments in the relevant paragraphs were as follows:

> 5 Mohamed Yunus Valibhoy has as a result of a sale of property owned by him and by virtue of entries entered in the books of the company reimbursed the total amount borrowed.
>
> 7 I crave leave to refer to the accounts of the company which are now produced and shown to me and copies, thereof attached hereto and marked 'MYG-1' and copies of the auditors' reports marked 'MYG-2'.

To illustrate the unrealiability of the applicant's evidence, and the possibility of the applicant deliberately misleading the court by suppressing important evidence, the official receiver's affidavit drew attention to one instance. This referred to the statement of the applicant's accountants dated 2 March 1985 confirming that the amount which would have been due from the company as at 31 December 1982 had been transferred to Mr Valibhoy. The statement was an exhibit to both the affidavits by Mrs Valibhoy and Mr Mohamed Yunus Gani in Companies Winding-Up No 434 and to the third affidavit by Mr Valibhoy; but the statement exhibited to Mr Valibhoy's affidavit omitted the important last sentence: 'He has reimbursed the said amount in full to the company as of date'.

On 9 March 1989, Mr Valibhoy filed the fourth affidavit in reply to the official receiver's affidavit of 3 March 1989. This repeated his previous averments that the only reason why the breakdown of the amounts owed by associate companies in the audited accounts of the applicant for 1982 did not show any amount owed by the company was because the liability for all amounts paid by the applicant to the company up to 31 December 1982 had been transferred to Mr Valibhoy under the resolution passed at the applicant's board meeting in 1984; in the circumstances, the applicant's audited accounts for that year showed the company's debt as a debt due by him personally. If the applicant's board resolution had not been passed in 1984, the applicant's audited accounts for 1982 would have still shown a debt owed by the company to the applicant. In this fourth affidavit, however, the applicant finally did not deny that it had received settlement of the sum of $2,428,418.49 from Mr Valibhoy.

It appeared to me that there were two main issues to be decided in this case, and an answer to the first issue might obviate the need to deal with the second:

(a) whether there was any existing debt of $2,428,418.89 owed by the company to the applicant at the time when it was wound up on 11 March 1983;

(b) if there was such a debt, whether the debt was extinguished by Mr Valibhoy making full payment of it to the applicant or whether the applicant could still continue to claim for it against the company or its liquidator.

Given the close relationship between these two associate companies, the dominant position in them of Mr Valibhoy and his family, the paradoxical situation in this case in which the person now filing all the affidavits on behalf of the applicant was the same person who controlled and managed the company before it was wound up, and the great ease with which inter-company transactions between the companies were clearly devised and implemented, it was necessary at the very least to put the applicant to strict proof of all its assertions.

It would appear from the applicant's audited accounts for 1979, 1980 and 1981 that the company had, from time to time over the years, been a debtor to the applicant. But, having started off by claiming a debt by the

company of $2,428,418.49, what the applicant had to prove in this case was that, as at 11 March 1983 when it was wound up, the company owed the applicant no less than $2,428,418.49. If the audited accounts of the applicant were to be used as part evidence of this debt, then the applicant should prove that as at 31 December 1982 there was a debt by the company which was carried through to 11 March 1983 into a debt of $2,428,418.49.

The applicant claimed that the amount of the debt, which was very much larger than the comparative figures in 1979, 1980 and 1981, resulted from 'loans and payments for and on behalf of' the company to enable the company to continue in business. The evidence offered by the applicant to substantiate its claim was confined to trying to prove the single total figure of $2,428,418.49. It consisted of a progressive miscellany of pages extracted from its own ledgers, its own audited accounts, an isolated certificate from its own accountants, and an audit confirmation signed for the company, just before the company was wound up, by no less than the same person who was now filing all the affidavits on behalf of the applicant.

Presented in a series of bits and pieces, the applicant's case depended almost entirely on the acceptance of the evidence of its accountants and its own audited accounts, which it allowed to surface at need. The audited accounts of the applicant, as averred by Mr Valibhoy in his fourth affidavit of 9 March 1989, were indeed prepared to 'reflect the state of affairs of the applicant for the use of its shareholders', but auditors are dependent for their information regarding the affairs of a company on what is provided to them by the persons in control of the management of the company. In this connection, the relationship between these companies and the manner in which the persons who had exercised common control over them presented their claim merely depreciated the value which would normally be given to audited accounts.

It may well be that, in what might be called a straightforward case, documents such as those produced by the applicant might be accepted as sufficient evidence to prove a debt obligation. But, in this case, once the validity of the claim was challenged, it was incumbent on the applicant to go to the root of the matter and to produce proper evidence of the various 'loans and payments for and on behalf of' the company which added up to the figure of $2,428,418.49 and which it claimed to have made. There should have been the proofs indicated by r 81, specifying the credit and debit notes, the vouchers and receipts, and other documentary evidence by which these loans and payments for and on behalf of the company could be substantiated. This evidence had been asked for repeatedly by the official receiver but had not been forthcoming, and throughout the exchange of affidavits before this court, the applicant appeared to have studiously avoided dealing with this real issue. In the result, no proper evidence was given of the various 'loans and payments for and on behalf of' the company.

On the first issue, therefore, I came to the conclusion that the applicant had failed to satisfy me that, at the time that the company was wound up on 11 March 1983, there had been a debt owed by the company to the applicant of $2,428,418.49 as alleged, or indeed any other sum, and accordingly that the application must be dismissed with costs.

The first issue having been decided against the applicant, it was not necessary for me to decide the second issue. But, since the second issue was also argued before me, it might be appropriate for me to make some observations on it. On the assumption that the company's debt to the applicant was proved, the applicant's counsel argued that the applicant's board resolution of 2 April 1984 could not bring about an assignment of the chose in action, that accordingly the transfer of the debt to Mr Valibhoy remained no more than an internal arrangement or 'book transfer', and the applicant remained the proper party to pursue the claim against the liquidator. Mr Valibhoy's direct settlement of the company's debt to the applicant could in no way pass any benefits to the company, since this was res inter alios acta.

On this issue, the respondent's counsel submitted that, if the company's debt had been proved, but had been settled directly by Mr Valibhoy to the applicant, the company's debt would thereby be extinguished, although the company itself might have been a stranger to the settlement, because effectively there would have been an accord and satisfaction of the debt. Counsel cited *Hirachand Punamchand & Ors* v *Temple*[1] and *Beswick* v *Beswick*.[2]

As a possible precedent to follow, *Hirachand*'s case[1] is not without difficulties, but it was a decision of the English Court of Appeal, and I was of the opinion that, if the company's debt to the applicant had been proved, the settlement by Mr Valibhoy to the applicant would also have extinguished the company's debt.

Application dismissed.

Solicitors: *TQ Lim & Co.*

Reported by *Terence Tan Bian Chye*